

In the Matter of Darnell Stith

DOP Docket No. 2003-4311

(Merit System Board, decided March 8, 2006)

The appeal of Darnell Stith, a Senior Correction Officer with the Department of Corrections (DOC), of his removal effective June 10, 2003, on charges, was heard by Administrative Law Judge Leslie Z. Celentano (ALJ), who rendered her initial decision on January 19, 2006. Exceptions and a reply to the cross-exceptions were filed on behalf of the appellant and cross-exceptions were filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Merit System Board (Board), at its meeting on March 8, 2006, accepted and adopted the Findings of Fact and Conclusion as contained in the attached initial decision and the recommendation to uphold the removal.

DISCUSSION

The appellant was charged with conduct unbecoming a public employee and other sufficient cause: use, possession or sale of any controlled dangerous substance. Specifically, the appointing authority asserted that the appellant tested positive for cocaine as a result of a random drug screening. Upon the appellant's appeal to the Board, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

The ALJ set forth in her initial decision that on March 5, 2003, the appellant was notified that he had been randomly selected for drug testing. The appellant was accompanied by Senior Investigator Scott Russo to a bathroom to collect the urine sample. While the appellant and Russo were in the bathroom, another supervisor and correction officer entered the room. The appellant testified that he placed his sample on the radiator while he washed his hands and then secured the cap on the bottle. Once the cap is secured on the bottle, it can only be removed by a special tool in the medical examiner's office. Subsequently, the appellant's sample was forwarded to the State Toxicology Lab where the integrity of the sample was checked before it was tested. The initial test of the appellant's sample tested positive for the cocaine metabolite benzoylecgonine. The cutoff level for the initial test was 300 ng/ml and the appellant's sample indicated over 5,000 ng/ml of benzoylecgonine. The confirmation test revealed the presence of 153999.21 ng/ml of benzoylecgonine, more than 150 times the cutoff level. Further, the appellant submitted a medication form which did not reveal any medications which would contribute to a positive result for the cocaine metabolite.

The ALJ found that there was no evidence presented which indicated that anyone attempted to go near the appellant's specimen bottle when he placed it on the radiator in the bathroom. Additionally, the ALJ determined that there was not a scintilla of evidence which suggested that the appellant's sample was defective or tampered with in any manner. Further, the ALJ concluded the chain of custody from the time the appellant voided his sample through the delivery and testing of the sample was proper and the integrity of the sample was preserved. Based on the positive result obtained through the testing process and for the foregoing reasons, the ALJ found that the appointing authority established by a preponderance of the evidence that the appellant had a presence of cocaine in his urine on March 5, 2003. Accordingly, the ALJ upheld the charges against the appellant and determined that the penalty of removal was reasonable and proper. Upon its *de novo* review of the record, the Board agrees with the ALJ's determination of the charges and penalty.

In his exceptions, the appellant argues that he was denied his Constitutional right to be free from an unreasonable search and seizure. Specifically, the appellant contends that the unreasonable search occurred when he was not provided privacy while voiding in the restroom as Russo and two other officers were present. The appellant relies on *New Jersey Transit PBA Local 304 v. New Jersey Transit Corporation*, 151 N.J. 531 (1997), in arguing that "modesty and individual privacy" should be protected during the specimen collection process. Further, the appellant asserts that both the Attorney General (AG) Guidelines and DOC's guidelines assure employees their privacy during voiding. The appellant argues that the guidelines indicate that unless there is a reason to believe that the employee will tamper with the specimen, individuals will void without the direct observation of the monitor. Moreover, he contends that he cannot be terminated from his employment based upon his submission to a procedure that he was told would protect his Constitutional rights but did not. In addition, the appellant claims that the chain of custody was flawed because there were other officers in the bathroom when he placed his specimen on the radiator and because the refrigerator in which his specimen was stored in the Special Investigations Division was not secure, as nine people have keys to the refrigerator and no records were kept of who opened the refrigerator.

In its cross-exceptions, the appointing authority asserts that its guidelines have been found numerous times to be in compliance with the AG Guidelines for law enforcement drug testing. Additionally, it contends that the appellant should have raised any concerns with its policies and procedures for random drug testing at the time he was tested or immediately thereafter. In this regard, the appointing authority contends that the appellant first raised his complaint concerning an alleged privacy violation when filing his post-hearing brief, and never mentioned his concern for privacy while the testing was being conducted. Further, the appointing authority argues that there was no evidence presented that the appellant was forced to use a urinal rather than a stall while voiding. Moreover, the appointing

authority asserts that there was no evidence of tampering with the appellant's sample.

Correction Officers are responsible for maintaining order in prisons, and random drug testing of safety-sensitive employees in such hazardous and regulated environments have been found to be reasonable and constitutional. *Cf. New Jersey Transit, supra*. The AG Guidelines regarding random drug testing were adopted in response to *New Jersey Transit*, in which the Court adopted a balancing test to determine the constitutionality of a random drug testing program. While the AG Guidelines were adopted in order to provide a uniform random drug testing program for law enforcement agencies, which would meet the standards set forth in *New Jersey Transit*, the procedures outlined in the AG Guidelines are certainly not the only means by which a law enforcement agency's random drug testing program can pass muster under *New Jersey Transit*. If deviations from the AG Guidelines do not amount to violations of the appellant's right to due process or call into question the validity of the positive test result, such deviations do not mandate voiding the test result. *See In the Matter of Bruce Norman*, Docket No. A-5633-03T1 (App. Div. January 26, 2006) and *In the Matter of Mario Lalama*, 343 N.J. Super. 560 (App. Div. 2001).

In the instant matter, the appellant does not contend that DOC's drug testing procedure was not valid, only that it did not follow its procedure since it did not provide the appellant privacy while voiding. However, the Board notes that any technical deviation from the AG Guidelines or from DOC's own guidelines does not necessarily warrant the nullification of the results of a drug test. *See Mario Lalama, supra* (Despite flaws in the chain of custody, a drug test was still valid where the record showed a "reasonable probability" that the integrity of the sample was maintained). In this regard, the appellant has not provided any evidence that the integrity of his sample was compromised. The mere fact that two other officers walked into the bathroom while he was voiding and were present when he put his sample down to wash his hands, does not evidence that his sample was tampered with. Further, the appellant has provided no evidence that anyone tampered with his sample at any point during the sample collection and testing process. Moreover, the appellant does not contend that he requested privacy at the time he was voiding and such privacy was denied. In this regard, a review of the record suggests that it was the appellant who chose to void at a urinal as opposed to using a stall. Accordingly, the Board finds that there is no evidence that the appointing authority denied the appellant his privacy while voiding.

In making its determination with regard to the proper penalty, the Board, in addition to its consideration of the seriousness of the underlying incident, utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is

appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 N.J. 571 (1980). In this case, a review of the appellant's past disciplinary history is unnecessary since it is clear that removal is the proper penalty based on the egregious nature of the offense and the fact that the appellant, as a law enforcement officer, is held to a higher standard than other public employees. State Correction Officers are law enforcement officers responsible for detecting and preventing violations of the law by the prisoners under their care in addition to overseeing the custody of those prisoners. State Correction Officers, like municipal Police Officers, hold highly visible and sensitive positions within the community and the standard includes good character and an image of utmost confidence and trust. *See Moorestown v. Armstrong*, 89 N.J. Super. 560 (App. Div. 1965), *cert. denied*, 47 N.J. 80 (1966). *See also In re Phillips*, 117 N.J. 567 (1990). The Board recognizes the importance of a drug-free work force, particularly where, as here, the appellant is employed as a sworn law enforcement officer. It is clear that drug usage cannot be tolerated in a law enforcement officer. Accordingly, the Board concludes that the penalty imposed by the appointing authority is neither unduly harsh nor disproportionate to the offense and should be upheld.

ORDER

The Merit System Board finds that the appointing authority's action in removing the appellant was justified. Therefore, the Board affirms that action and dismisses the appeal of Darnell Stith.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.